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In The

Supreme Court of the United States

ARTHUR S. LUJAN, *et al.*,

Petitioners,

vs.

G&G FIRE SPRINKLERS, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE THE PORT OF OAKLAND AND 54 CALIFORNIA CITIES IN SUPPORT OF PETITIONERS

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BRIEF OF AMICI CURIAE THE PORT OF OAKLAND AND 54 CALIFORNIA CITIES IN SUPPORT OF PETITIONERS

The Port of Oakland and the 54 cities as listed on Attachment A ("Amici") submit this brief of amici curiae in support of petitioners Victoria Bradshaw, et al.

STATEMENT OF AMICI CURIAE

A. Identity of Amici

Amici are 54 California public entities responsible for building and maintaining roads, bridges, buildings, harbors and airports for use by the public. In fulfilling these responsibilities, Amici award and execute numerous public works contracts in the manner specified by state law and local charters.

B. Interest of Amici

Amici have concluded that this case presents an issue of exceptional importance to municipalities because the holding that an ordinary public works contract creates a protected property interest under the Fourteenth Amendment to the U.S. Constitution holds the potential to open an entirely new realm of municipal liability. All cities utilize contractors to deliver municipal services; indeed some cities use contractors for all of their services. (*See*, Miller, *Cities by Contract: The Politics of Municipal Incorporation* (MIT Press 1981).) Unfortunately, disputes with contractors are an unavoidable part of contemporary public works administration. (*See*, Martin, *Management of Public Works Construction Projects*, pp. 121-122 (American Public Works Assoc. 1999).) If the decision below stands, state and local governmental agencies will face the threat of a federal civil rights suit, and a potential attorneys fees

award under 42 U.S.C. § 1988, in every dispute with a contractor.

C. Source of Authority

Amici are authorized by state law or local charter to participate in any judicial proceedings related to their operations. This brief is filed under the authority of U.S. Supreme Court, Rule 37.[1] Both Petitioner and Respondent have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Under this Court's precedents, the concept of a "property interest" protected by the Fourteenth Amendment is not strictly limited to real estate, chattels or money. But, this Court has also recognized that the range of protected interests is not infinite; the term "property" must be given some meaning. As Amici explain here, the decision below recognizing that an ordinary public works contract may create a protected property interest is erroneous for two reasons. First, a public works contract is fundamentally different from a contract of employment – the only type of contract recognized to create a property interest. Most significantly, the relationship between a public works contractor and the public agency is strictly limited at its inception to a limited time period and provides absolutely no assurance of continued work.

[1] Amici are cities, towns, or similar entities organized pursuant to the Constitution and laws of the State of California. The Board of Port Commissioners of the City of Oakland possesses exclusive control over the city's maritime and aviation matters. (*City of Oakland v. Hogan*, 41 Cal.App.2d 373, 342-725, 106 P.2d 897 (1940).) Counsel for a party did not author this brief in whole or in part. No person or entity, other than Amici, or their counsel, made any monetary contribution to the preparation and submission of this brief.

Additionally, the relationship between the public works contractor and the public entity is by definition one of hirer and independent contractor, non-exclusive, subject to numerous permutations and variations, and provides for payments contingent upon satisfactory performance. Second, even if the contractor's interest is characterized as receiving payment for its work, the California Legislature has chosen not to confer a property interest in anticipated payments under a public works contract. The contractor's entitlement to payment is by law contingent upon its satisfactory performance, including payment of sub-contractors and suppliers, and upon timely completion of the project. Finally, as a matter of public policy, the decision below will seriously impede the development and maintenance of vital public infrastructure.[2]

I.

A PUBLIC WORKS CONTRACT DOES NOT CREATE "PROPERTY" WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT BECAUSE THE CONTRACTOR'S RELATIONSHIP WITH THE PUBLIC AGENCY IS INHERENTLY TEMPORARY, NON-EXCLUSIVE AND SUBJECT TO LIMITLESS VARIATIONS.

"The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty'." (*American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 59, 119

[2] Amici agree with Petitioner's argument that G & G failed to prove the required element of state action as necessitated by *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999). However, as Amici explain, the majority opinion is also fatally flawed in that it holds that an ordinary commercial contract with a public entity creates a protected property interest, sufficient to create a federal cause of action in an ordinary contract dispute.

S. Ct. 977, 143 L. Ed. 2d 130 (1999).) As explained below, the transitory commercial interests of a public works contractor are fundamentally different from the types of interests that this Court has previously recognized as "property."

Since 1970, the conceptual contours of protected property interests have expanded beyond tangible property to embrace various species of government-created benefits, such as welfare and social security benefits. (*Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970); *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).) Amici do not dispute the correctness of this Court's decisions recognizing an individual's property interests in welfare or social security benefits. Instead, Amici contend that the transitory commercial interests of a public works contractor fall well outside the boundaries of this Court's past precedents.

There is a fundamental distinction between welfare and social security recipients on the one hand, and public works contractors, on the other. The welfare or social security recipient is under no reciprocal obligation to the government in exchange for the benefits received; having met the statutory eligibility criteria, the recipient need not provide any service or commodity to the government. The amount of a recipient's benefits does not vary depending upon the quality and quantity of his or her performance. In contrast, award of a public works contract does not immediately entitle the contractor to receive payment of the contract price. The contractor must first deliver complete performance as defined by the terms and conditions of the contract. The public works contract strictly specifies the quantity, quality and schedule for the work. Until the contractor has performed to the satisfaction of the public agency, it has only a "unilateral expectation" of payment, but not a "legitimate claim of entitlement." (*Cf. Board of Regents of State Colleges v. Roth*, 408 U.S. 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548.)

It has long been recognized that a contract with a public entity may provide the source for a protected property interest. (*Roth, supra*, 408 U.S., at 570, 572, 92 S. Ct. 2701, 33 L. Ed. 2d 548.) To date, however, this Court has found only that contracts of employment are sufficient to create a protected property interest. (*Id., see also, Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).) In determining whether an interest rises to the level of "property", this Court must examine not the "weight" of the asserted interest, but "the nature of the interest at stake." (*Roth, supra*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548.) The employee tenure cases may be explained by the importance of employment to the individual in modern society: "It is a purpose of the ancient institution of property to protect those claims upon which *people rely in their daily lives*, reliance that must not be arbitrarily undermined." (*Roth, supra*, 408 U.S., at 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 [emphasis added].) Contemporary employment relationships provide the employee more than simple monetary remuneration; an employees's health care, retirement pension, investments and, sometimes, even sense of identity are also bound up in the relationship.

In *Roth*, this Court considered the claim of a non-tenured college professor hired for a fixed annual term. Under the relevant rules of the Board of Regents, Roth was notified that he would not be retained for the following academic year. The only question considered by this Court was whether the Fourteenth Amendment required the Board to provide Roth with notice and a hearing prior to making the non-retention decision. This Court held that the Board was not required to provide notice and a hearing because it did not deprive Roth of "property" within the meaning of the Fourteenth Amendment. The applicable state laws and regulations provided Roth with only a fixed annual term of employment and "secured absolutely no interest in re-employment for the next

year." (*Roth, supra,* 408 U.S., at 578, 92 S. Ct. 2701, 33 L. Ed. 2d 548.)

The transitory commercial interests of a public works contractor are of a qualitatively different nature from the individual interest of an employee.

First, like the fixed annual contract considered in *Roth,* a public works contract creates an inherently temporary commercial relationship between the contractor and the public agency that lasts only until the project is complete. (*See,* Martin, J., *Management of Public Works Construction Projects,* pp. 114-116 (American Public Works Assoc. 1999).) The inherent temporal limitation in a public works contract is indistinguishable from the one-year employment contract at issue in *Roth.* Standing alone, this fundamental feature disqualifies a public works contract from the category of protected property interest. (*Roth, supra,* 408 U.S., at 578, 92 S. Ct. 2701, 33 L. Ed. 2d 548.) However, the public works contractor's claimed property interest is even weaker than that asserted by Professor Roth because the contractor's scope of work is also precisely defined to a degree that would be intolerable in an employment relationship. The strict limits upon the contractor's scope of work are highlighted by the fact that, unlike an employee, a public works contractor is entitled to equitable adjustments in its payments when the nature of the work deviates from the contractually defined scope of work. (*Souza & McCue Constr. Co. v. Superior Court,* 57 Cal.2d 508, 20 Cal.Rptr. 634 (1962).)

Second, the relationship between the public entity and the contractor is rarely exclusive; the contractor is at liberty to work on other projects simultaneously.[3] As a

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[3] It is this fact that necessitated the recognition of the "Eichleay formula" for apportioning a contractor's lost home office overhead among numerous projects in order to measure indirect damages caused by the contracting agency. (*See, Capital*

result, public works contractors have a greater ability than public employees to protect themselves from unfair treatment by public agencies either by adjusting their bids or simply avoiding bidding in the first instance.[4] Indeed, in formulating their bids, public works contractors consider an agency's (positive or negative) reputation for fair dealing, the agency's reputation for making prompt payments, the reasonableness of liquidated damages measures and the availability of other, more attractive, projects. (Martin, *supra,* pp. 54, 65, 95.)

Third, by definition a public works contractor acts as an independent contractor whose payments are measured by its satisfactory performance. Contractors and sub-contractors are engaged in a distinct, legally defined, occupation or calling. (*Green v. Soule,* 145 Cal. 96, 99, 78 P. 337 (1904); *Sparks v. Folsom Co.,* 217 Cal.App.2d 279, 288, 31 Cal.Rptr. 640 (1963).) Only licensed contractors may be awarded a public works contract. (Cal. Bus. & Prof. Code, § 7028.15 (Deering's 1993).) Payments to the public works contractor are based only upon estimates of the work completed as determined by the public agency. (Cal. Pub. Con. C. §§ 9203, 10261 (Deering's 1994 and 2000 pkt. supp.), *see also,* Part II, *infra.*)

Elec. Co. v. United States, 729 F.2d 743 (Fed. Cir. 1984); *Howard Contracting, Inc. v. G.A. McDonald Construction Co., Inc.,* 71 Cal.App.4th 38, 83 Cal.Rptr.2d 590 (1998).)

[4] Professor Terrell argues that the Due Process Clause's function of discouraging arbitrary government action is of limited importance when external constraints have the same effect: "The most important external constraint for our purposes is the general effect that marketplace competition has on government behavior and individual choice." (Terrell, Timothy P., *"Property", "Due Process" and the Distinction Between Definition and Theory in Legal Analysis,* 70 Geo. L.J. 861, 901 (Feb. 1982).)

Finally, interests that are by their nature amorphous and limitless are outside the original intent that animated the drafters of the Fourteenth Amendment. (*Paul v. Davis*, 424 U.S. 693, 698-699, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976).) While the concept of "property" has not been strictly limited to actual ownership of real estate, chattels or money, this Court has acknowledged that "the range of interests protected by due process is not infinite", for the term "property" as used in the Fourteenth Amendment "must be given some meaning." (*Roth, supra*, 408 U.S., at 570, 572, 92 S. Ct. 2701, 33 L. Ed. 2d 548; *see, Paul, supra*, 424 U.S., at 698-699, 96 S. Ct. 1155, 47 L. Ed. 2d 405.)

Employment relationships all share the common structure of an individual person's commitment to perform generally described duties in exchange for defined pay and benefits. This structural consistency ensures that the term "property" is applied to interests with definite form and substance. In contrast, the structure of a relationship between a public works contractor and a public agency, as well as the form of the contractor, is subject to myriad variations spawned by the commercial marketplace. A public works contractor may assume the form of a sole proprietorship, partnership, corporation, or a joint-ventures of each. (Cal. Bus. & Prof. C. §§ 7025, 7029-7079.1, 7076 (Deering's 1993.) They may consist of joint-ventures between design professionals and licensed builders. (Cal. Bus. & Prof. C. § 7029.) To an even greater degree, the nature of the commercial terms is also highly variable and includes such options as building according to prepared plans and specifications, design-build, sale and lease-back arrangements, and design-build-operate agreements. (*See*, Cal. Gov. C. §§ 13332.19 (Deering's 2000 pkt. supp.), 14661 (Deering's 1999), Cal. Pub. Con. C. § 20670 *et seq.* (Deering's 1994).) Applying the term "property" to an interest subject to such kaleidoscopic variations serves only to dilute the meaning of the term.

Together or individually, the inherent features of public works contracts distinguish them from the individual contract-based interests that have thus far received constitutional protection. In contemporary society, employment may be properly characterized as a property interest given its overriding importance to the individual. (*San Bernardino Physicians' Services Medical Group v. County of San Bernardino*, 825 F.2d 1404 (9th Cir. 1987); *S & D Maintenance Co., Inc. v. Goldin*, 844 F.2d 962 (2nd Cir. 1988).) To extend such protection, however, to ordinary commercial contracts simply because one of the parties is a public agency is unwarranted given the fundamental differences in the duration and scope of the relationship, the non-exclusive nature of the relationship, the fact that an independent contractor whose payments are measured by the agency's satisfaction is legally distinct from an employee and the limitless variation in the forms of public works contractors and their commercial relationships with public agencies. Amici therefore urge this Court to hold that a public works contract cannot be the source of a property interest under the Fourteenth Amendment.

II.

ANTICIPATED PAYMENTS UNDER A PUBLIC WORKS CONTRACT ARE NOT PROPERTY WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT BECAUSE AS A MATTER OF LAW THE CONTRACTOR IS NOT ENTITLED TO PAYMENT UNTIL IT SATISFIES THE TERMS OF THE CONTRACT.

In its decision below, the majority suggest that the locus of the contractor's property interest is its interest in "being paid in full for the construction work it has completed." (*G & G Fire Sprinklers v. Bradshaw*, 156 F.3d 893, 901 (9th Cir. 1998) reinstated, *G & G Fire Sprinklers v. Bradshaw*, 204 F.3d 941 (9th Cir. 2000).) Therefore, the

lower court held that the State was required to provide due process prior to withholding G & G's anticipated payments. As described above, Part I, the inherent features of a public works contract bar its characterization as property. However, even characterizing the contractor's interest as one in anticipated payments is unavailing because a property interest is created and defined in statutory terms and a state legislature may elect not to confer a property interest at all. (*Cf. Cleveland Bd. Of Ed., supra*, 470 U.S., at 541, 105 S. Ct. 1487.). As Amici explain next, the California Legislature has elected not to confer a property interest in anticipated payments under a public works contract.

In California, anticipated payments under a public works contract fall into the same constitutional category of "non-property" as the disputed workers' compensation benefits at issue in *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999) ("*American Manufacturers*"). In *American Manufacturers*, this Court considered whether the Due Process Clause permits workers' compensation insurers to unilaterally withhold disputed medical treatment prior to a determination that the medical treatment was reasonable and necessary. Under the insurance program at issue in *American Manufacturers*, state law entitled injured workers to receive all "reasonable" and "necessary" medical treatment for work-related injuries. The insurer, however, was authorized to dispute the amount of medical payments if they were deemed unreasonable or unnecessary. Moreover, pending a determination of the issue by a neutral party, state law authorized the insurer to withhold payment for medical treatment. Respondent employees filed suit alleging that the medical benefits constituted "property" that could not be withheld without first affording the injured worker due process.

In rejecting the employees' claims, this Court distinguished the asserted property interest from other types of

government payments, such as welfare payments and social security disability payments, which have achieved the status of property. (*American Manufacturers, supra*, 526 U.S., at 60, 119 S. Ct. 977, 143 L. Ed. 2d 130; citing, *Goldberg, supra*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 and *Mathews, supra*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18.) The employees' claims for medical benefits were "fundamentally different" from such statutory entitlements because state law expressly limited the employee's entitlement to reasonable and necessary medical treatment. Most significantly, state law required that disputes over the reasonableness of and necessity of a particular treatment be resolved before an employer's obligation to pay – and an employee's entitlement to benefits – arose. (*American Manufacturers, supra*, 526 U.S., at 60, 119 S. Ct. 977, 143 L. Ed. 2d 130.) The injured employee's property interest arose, if at all, only after he or she established both that the employer was liable *and* that the medical treatment was reasonable and necessary. The result reached in *American Manufacturers* is an elaboration of this Court's previous observation that the Fourteenth Amendment provides a safeguard of "the security of interests that a person has *already* acquired in specific benefits." (*Roth, supra*, 408 U.S., at 576, 92 S. Ct. 2701, 33 L. Ed. 2d 548 [emphasis added].)

As explained in detail below, four features of public works contracting in California establish that the Legislature has elected not to confer a property interest in anticipated payments under a contract: 1) satisfactory performance of the contract is a condition precedent to any entitlement to payment, 2) public agencies are authorized to withhold disputed payments pending resolution of the dispute, 3) payments are subject to withholding of liquidated damages, and 4) public agencies must retain a portion of each progress payment until the project is accepted as complete. Considered together or individually, these statutory features establish contingencies that

are indistinguishable from the "reasonable and necessary" requirement at the center of this Court's holding in *American Manufacturers*.

A. Satisfactory Performance of a California Public Works Contract is a Condition Precedent to Any Entitlement to Payment.

"As a general proposition, complete performance of a public improvement contract is a condition precedent to the right to recover compensation." (McQuillin, E., Muni. Corp., § 137.132 (3rd Ed.) Clark, Boardman, Callaghan.) A condition precedent is an act which must be performed before the promisor's duty of performance arises. (Cal. Civ. C. § 1436 (Deerings 1994).) Therefore, as a general matter, a contractor has no legitimate claim of entitlement to being paid until it has delivered satisfactory performance under the contract. This principle is embodied in the California Public Contract Code under various provisions that condition payment to the contractor on satisfying the public agency. For example, payments upon contracts must be made based on estimates of work completed which are made and approved by the agency. (Cal. Pub. Con. C. §§ 9203 (local agencies), 10261 (state agencies) (Deerings 1994 and 2000 pkt. supp.).) Significantly, the State Controller is authorized to make payments to contractors only upon the State-approved estimates. (Cal. Pub. Con. C. § 10261.)

Thus, at the outset, the contractor's entitlement to payment does not arise until its performance is satisfactory to the public agency.

B. With Respect to "Disputed Amounts" The Public Agency May Withhold Anticipated Payments Pending Resolution of the Dispute.

California law requires public agencies to promptly make progress payments to prime contractors, and that

prime contractors make prompt payments to sub-contractors. The Legislature, however, has unambiguously exempted "disputed amounts" from this requirement. (Cal. Pub. Con. C. §§ 7107 (Deering's 2000 pkt. supp.), 10261.5 (Deering's 1994), 10853 (Deering's 1994), 20104.50 (Deering's 1994), Cal. Civ. C. § 3320 (Deering's 2000 pkt. supp.), Cal. Gov. C. §§ 926.19, 927.3 (Deering's 2000 pkt. supp.)[5] Moreover, state law provides that in the event of a dispute between the public agency and the contractor, the agency may "withhold from the final payment an amount not to exceed 150 percent of the disputed amount." (Cal. Pub. Con. C. §§ 7107, subd. c.) Even on projects constructed under private contract, the owner may withhold from the contractor 150% of disputed amounts if the project is ultimately intended for use by the public. (Cal. Civ. C. § 3260, subd. c(3) (Deering's 2000 pkt. supp.)

Similarly, state law imposes a duty on a public agency to withhold payments from the prime contractor upon the request of an unpaid sub-contractor or material supplier. (Cal. Civ. C. § 3179, *et seq.* (Deering's 1986).) Upon receipt of a "stop notice" from the unpaid sub-contractor, the public agency is required to withhold the disputed amount pending resolution of the dispute. (Cal. Civ. C. § 3186 (Deering's 2000 pkt. supp.).) The contractor may obtain release for the withheld payment, but only if it first submits to the public agency a bond equal to 125% of the disputed amount. (Cal. Civ. C. § 3196, (Deering's 1986).)

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[5] *Breda Costruzioni Ferroviarie v. Los Angeles County Metropolitan Transportation Agency*, 56 Cal.App.4th 1433, 66 Cal.Rptr.2d 416 (1997), is not to the contrary. There, the court held only that interest earned on temporarily withheld funds under a public contract must be paid to the contractor. One commentator has criticized the decision as "based on uninformed assumptions." (Acret J., *California Public Construction Contract Law Handbook*, 191 (BNI Publications-2000).)

C. Payments Under Public Works Contracts Are Subject to Withholding of Liquidated Damages.

The Legislature's requirement that the public agencies include in their contracts liquidated damages provisions is yet another signal of its intent not to confer property status on anticipated payments to a public works contractor.

The decision below cannot be reconciled with the fact that the Legislature has mandated that state agencies include liquidated damages provisions in all public works contracts. Liquidated damages clauses "are intended as a more direct, faster and cheaper alternative than litigation for setting time-related financial damages." (Martin, *supra*, 54, *see also*, McQuillin, § 137.141.) Acret opines that "liquidated damages provisions are particularly appropriate to public contracts" in light of the difficulty of establishing damages for lost use. (Acret, *supra*, § 4.17, p. 46.) The State must include in its public works contracts provisions permitting the forfeiture of liquidated damages for late completion – "to be deducted from any payments due or to become due." (Cal. Pub. Con. C. § 10226 (Deerings 1984).) Any city, county or district may include in its public works contracts a late-completion provision under which a specified sum of money is to be "deducted from any payments due or to become due to the contractor." (Cal. Gov. C. § 53069.85 (Deering's 2000 pkt. supp.)

D. All Progress Payments Under a Public Works Contract Are Subject to Retention of Five Percent.

"The hallmark of a protected property interest is the right to exclude others." (*College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 672, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999).) For public works contracts, the Legislature has mandated that a portion of the contractor's earned progress payments be

withheld during the project – these funds are known as "the retention." As a matter of law, the public works contractor is neither entitled to, nor in exclusive control of, the retained funds until its *total* performance is complete according to the terms of the contract.

A leading authority on California construction law explains, "[T]he purpose of the retention is to provide economic motivation for the contractor to complete the project and to give the public agency financial security . . . [F]or example, the agency could use the retained funds to repair defective work." (Acret J., *California Public Construction Contract Law Handbook*, § 4.04 (BNI Publications – 2000); *see also*, McQuillin, *supra*, Muni. Corp., § 37.179.) Under California law, local agencies must retain "not less than five percent of the contract price until *final completion and acceptance of the project*." (Cal. Pub. Con. C. § 9203 (Deering's 1994) [emphasis added].) The requirement to include retention provisions in public contracts also applies to state agencies and the California State University (Cal. Pub. Con. C. §§ 10261, 10851 (Deering's 1994).) Thus, like the injured workers considered in *American Manufacturers*, a California public works contractor does not possess a fully matured entitlement to receive even its earned, but retained, funds until final completion and acceptance of the project. Similarly, the very purpose for which funds are retained, to motivate the contractor and provide potential compensation to the public agency for defaults, establishes that where a dispute exists as to the contractor's entitlement, there can be no constitutionally protected property interest in the retained funds. (*Cf. American Manufacturers, supra*, 526 U.S., at 60, 119 S. Ct. 977, 143 L. Ed. 2d 130.)

The retention escrow provisions of state law further highlight both the contractor's contingent entitlement to the retained funds and its lack of exclusive control of the retained funds. Contractors may substitute securities for the retention amount, but only if the securities are held in

escrow by a state or federally chartered bank. (Cal. Pub. Con. C. §§ 10263, 22300 (Deering's 2000 pkt. supp.).) Only upon "*satisfactory completion* of the contract" can the securities be returned to the contractor. (Cal. Pub. Con. C. §§ 10263, 22300, subd. (a) [emphasis added], *see also*, the terms of the mandated Escrow Agreement included with the statute.) Under this Court's holdings in *American Manufacturers, supra*, and *College Savings Bank, supra*, the retention provisions of California law are additional indicia of the Legislature's intent not to confer a property interest in anticipated payments under a public works contract.[6]

In sum, like the medical benefits in *American Manufacturers*, anticipated payments under a California public works contract cannot constitute "property" until all statutory conditions precedent for their payment are satisfied. Under California law, the contractor does not have a legitimate claim of entitlement to payments until it satisfactorily performs according to the contract terms, as approved by the public agency, resolve disputes, pay its sub-contractors and suppliers, and completes the work on schedule. The decision below simply cannot be reconciled with the clear intent of the California Legislature not to confer the status of "property interest" on payments under a public works contract. Therefore, Amici urge this Court to hold that anticipated payments under a public works contract do not constitute a property interest under the Fourteenth Amendment.

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[6] It may be the case that the retention is insufficient to compensate the contracting agency for contractor caused damages. Therefore, in the event that the public agency suffers damages in excess of the retention amount, the contractor and its surety are liable to the agency for the excess. (Cal. Pub. Con. C. §§ 10258, 20490.)

III.

THE DECISION BELOW WILL SERIOUSLY IMPEDE THE DEVELOPMENT AND MAINTENANCE OF VITAL PUBLIC INFRASTRUCTURE BY CONVERTING ORDINARY CONTRACT DISPUTES INTO FEDERAL CIVIL RIGHTS CLAIMS WHICH ALLOW FOR INDIVIDUAL LIABILITY AND PREVAILING PLAINTIFF ATTORNEY'S FEES UNDER 42 U.S.C. SECTION 1988.

In his dissenting opinion in the original *G & G Fire Sprinklers* decision, Judge Kozinski identified with striking clarity the detrimental impact the majority opinion will have on state and local governments. (*G & G Fire Sprinklers, supra*, 156 F.3d, at 909-910.) Amici share Judge Kozinski's concern that the majority holding will hobble the ability of public entities to construct and maintain vital public improvements.

The identical concern expressed by this Court in *Paul v. Davis* is presented in the decision below. (*Paul, supra*, 424 U.S., at 698-699, 96 S. Ct. 1155, 47 L. Ed. 2d 405.) To paraphrase this Court's holding in *Paul v. Davis*, the reasoning of the majority opinion below would seem almost necessarily to result in every breach of a public works contract by a state or local agency establishing a violation of the Fourteenth Amendment. As noted by Judge Kozinski, the result adopted by the majority opinion will effectively "constitutionalize" a broad swath of garden variety contract disputes simply because one of the parties is a government agency. (*G & G Fire Sprinklers, supra*, 156 F.3d, at 909.) At least 16 other federal judges have expressed the same concern.[7]

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[7] *See, S & D, supra*, 844 F.2d 962 [Feinberg, Newman, Winter, JJ.]; *Unger v. National Residents Matching Program*, 928 F.2d 1392 [Hutchinson, Resenn, JJ.]; *Martz v. Incorporated Village of Valley Stream*, 22 F.3d 26 [Miner, Mahoney, Restani, JJ.]; *San Bernardino Physicians, supra*, 825 F.2d 1404 [Hug, Canby, Norris, JJ.];

In particular, two aspects of § 1983 liability will fundamentally alter the dynamics of public works administration to the detriment of the public. First, the decision below will discourage vigorous protection of the public fisc by permitting imposition of individual liability upon project managers, engineers and administrators. (*See, e.g., Hafer v. Melo,* 502 U.S. 21, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991).) As noted by Judge Kozinski, "when the government is acting as a commercial entity, taxpayers cajole it to act with all the ferociousness the marketplace demands." (*G & G Fire Sprinklers, supra,* 156 F.3d, at 910, n.2.) Self-evidently, the prospect of individual liability under § 1983 will be a disincentive for public works managers to vigorously enforce the terms of commercial contracts in order to obtain complete performance. The taxpayers will bear the consequences in the form of higher costs and delayed completion of critical public improvements.

Second, as the instant case illustrates, liability under § 1983 carries with it the right to prevailing plaintiff attorney's fees under 42 U.S.C. § 1988. Under California law, parties to an ordinary breach of contract action are entitled to recovery of attorney's fees only if their contract specifically provides such a remedy. (Cal. Civ. C. § 1717 (Deerings 1994); *Excess Electronixx v. Heger Realty Corp.*, 64 Cal.App.4th 698, 75 Cal.Rptr.2d 376 (1998).) However, as a practical matter, the majority opinion may result in the imposition of a significant contract remedy in every public works contract, regardless of the mutual assent of the parties.

The contours of the expanded zone of § 1983 liability which might result if the decision below is allowed to

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Walentas v. Lipper, 862 F.2d 414 (2nd Cir. 1988) [Mahoney, Winter, JJ.]; *Reich v. Beharry,* 883 F.2d 239 [Seitz, Stapleton, Cowan, JJ.].

stand are suggested by the frequency with which payments are withheld from contractors in the course of a construction project. The withholding or partial withholding of payments by a project owner is an inherent feature of construction projects, whether privately or publicly owned. (*See,* Sweet & Sweet, *Sweet on Construction Industry Contracts-Major AIA Documents,* § 15.11 (4th Ed.) (Aspen Law & Business 1999).) Moreover, in California numerous statutes authorize or require state and local agencies to withhold funds from a contractor for such reasons as failure to execute a contract after award (Cal. Pub. Con. C., §§ 10164, 10781, 10782, 20103.5, 20172, 20418 (Deering's 1994)), as liquidated damages (Cal. Pub. Con. C. §§ 10226, 10826 (Deering's 1994)), Cal. Gov. C. § 53069.85 (Deering's 2000 pkt. supp.), due to disputes regarding amounts due (Cal. Pub. Con. C. § 7107, § 10262.5 (Deering's 2000 pkt. supp.)), and in order to protect the rights of a sub-contractor or supplier (Cal. Civ. C. § 3186 (Deerings 2000 supp.)). Indeed, the construction industry's own standard contract specifications make frequent use of this commercially accepted practice. (Public Works Standards, Inc., *Greenbook: Standard Specifications for Public Works Construction* (2000 ed.) § 4-1.1 (deduction for defective materials or work); § 6-2 (deduction for failure to provide for public safety, traffic and protection of work); § 6-9 (liquidated damages) (BNI Publications, 1999).)

In sum, if the decision below is allowed to stand, disputes surrounding the administration of public works contracts will escalate into civil rights litigation. Public project managers will find themselves threatened with personal liability for decisions that are a common practice in the private sector. Public agencies will encounter greater difficulty in resolving disputes informally where the promise of an attorney's fee award awaits the successful contractor. Ultimately, the public will suffer the effects in delay, expense and substandard infrastructure.

CONCLUSION

Based on the foregoing, Amici urge the Court to hold that neither a public works contract, nor anticipated payments under such a contract, constitute "property" under the Fourteenth Amendment. The decision below should therefore be reversed.

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